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IN THE

Supreme Court of the United States

SENATOR MITCH MCCONNELL ET AL.,
Appellants/Cross-Appellees,

—v.—

FEDERAL ELECTION COMMISSION ET AL.,
Appellees/Cross-Appellants.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF *AMICI CURIAE*, FORMER LEADERS OF THE AMERICAN CIVIL LIBERTIES UNION, IN SUPPORT OF APPELLEES/CROSS-APPELLANTS FEDERAL ELECTION COMMISSION, *ET AL.*

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INTEREST OF AMICI CURIAE[1] AND STATEMENT OF POSITION

Amici constitute persons who have served as ACLU President, ACLU Executive Director, ACLU National Legal Director, and ACLU National Legislative Director. Norman Dorsen served as ACLU General Counsel from 1969-1976 and as President of the ACLU from 1976-1991. John Pemberton served as Executive Director of the ACLU from 1962-1970 and Aryeh Neier served as Executive Director from 1970-1978. john powell served as National Legal Director from 1987-1993. John Shattuck served as National Legislative Director of the ACLU from 1976-1984 and Morton Halperin as National Legislative Director from 1984-1992.[2] *Amici* have devoted much of their professional lives to the ACLU and, in particular, to the protection of free speech. They are proud of their ACLU service, and they continue to support the ACLU's matchless efforts to preserve the Bill of Rights. They believe, however, that the opposi-

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

[2] Burt Neuborne, who served as National Legal Director from 1982-1986 and who joined with *amici* in a statement supporting the legislation, represents the intervenor-defendants/appellees Senator John McCain *et al.* in defense of the constitutionality of the Bipartisan Campaign Reform Act and is therefore ineligible to appear on this brief. Charles Morgan, Jr., who served as National Legislative Director from 1972-1976, signed a letter to Congress with the other *amici* publicly supporting the constitutionality of the BCRA, but he is currently ill and unable to consent to appear on this brief. Bruce Ennis, who preceded Burt Neuborne as National Legal Director and who joined in the statement in support of the legislation, died prior to the commencement of this litigation.

tion of the current leadership of the ACLU to campaign finance reform in general, and the Bipartisan Campaign Reform Act ("BCRA"), Pub. L. 107-155, 116 Stat. 81, in particular, is misplaced. *Amici* submit this brief to elucidate their publicly-stated view that the electioneering provisions of BCRA, Sections 201-204, are facially constitutional.[3]

SUMMARY OF ARGUMENT

The electioneering provisions of BCRA, Sections 201-204, address the growing evasion of existing campaign finance regulations through the use of broadcast advertisements designed to influence federal elections, yet not subject to the disclosure requirements or the funding source prohibitions that for decades have been placed on other forms of electioneering activity. These advertisements avoid words expressly advocating the election or defeat of a particular candidate, while leaving no doubt to the listener that a particular candidate's election or defeat is preferred.

To bring these advertisements within the existing campaign finance regulations, Congress adopted a definition of electioneering communication, carefully limited to broadcast, cable, or satellite communications referring to a clearly identified candidate for federal office, made within 60 days of a general election or 30 days of primary election, and targeted to the relevant electorate. Congress then imposed the same funding and disclosure requirements on these communications that for decades have applied to other electioneering communications.

[3] *Amici* support the constitutionality of the soft money provisions of BCRA, Sections 101-103, which is fully and adequately defended in other briefs before the Court.

Appellants' facial challenge, while conceding the numerous constitutional applications of the electioneering communications provisions, nevertheless asserts that the definition of electioneering communication adopted by Congress was overbroad in that it may reach, in certain instances, issue advocacy unconnected with a pending election. Further, appellants argue that the fall-back definition of electioneering communication adopted by Congress, limiting the term to broadcast, cable, or satellite communications promoting, supporting, attacking, or opposing a candidate for office and suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate, is unconstitutionally vague and therefore must be stricken on its face.

Appellants' challenge fails for at least four reasons. *First*, petitioners wrongly invoke the overbreadth doctrine to challenge the primary definition of electioneering communication. The Court has held that it will not invoke the "strong medicine" of overbreadth facial invalidation unless a law is substantially overbroad and only upon due consideration of the costs exacted by facial invalidation. Given that the overwhelming majority of the applications of BCRA are constitutional and that appellants have multiple avenues available for as-applied relief, appellants' facial challenge cannot stand.

Second, appellants' facial vagueness challenge to the back-up definition fails for similar reasons. A law may be stricken as facially vague only where it lacks an operative core of prohibited conduct. There can be no doubt as to the core application of the fall-back definition of electioneering communication. Whether the definition may be vague in application to particular circumstances must be reserved for an appropriate as-applied challenge.

Third, the application of existing funding and disclosure requirements to electioneering communications as defined by BCRA is clearly constitutional under the Court's precedents. The Court has long upheld restrictions on corporate and labor union funding of electioneering communications, and has similarly held that disclosure requirements serve important First Amendment interests in informing the public about the sources of support for candidates for public office. The extension of these funding restrictions and disclosure requirements to electioneering communications as defined by BCRA is perfectly consistent with the Court's campaign finance jurisprudence.

Last, the contention that the Court's limiting construction in *Buckley v. Valeo*, 424 US 1 (1976), forever constrains Congress to regulate only words expressly advocating the election or defeat of a candidate misreads the Court's decision in *Buckley*. Moreover, given the ease with which electoral communications may avoid words of express advocacy, a holding that these magic words form a constitutional ceiling beyond which no campaign finance law may reach would leave Congress unable to create any effective system of campaign finance regulation. Nothing in the First Amendment or the Court's precedents requires such a result.

ARGUMENT

I. Appellants' Facial Challenge to BCRA Must Be Rejected Because BCRA's Scope is Precisely and Narrowly Tailored and Cannot Be Deemed "Substantially Overbroad"

Congress adopted alternative definitions of the term "electioneering communication" in the BCRA. The primary definition provides that an electioneering com-

munication is a "broadcast, cable, or satellite communication" which— (1) "refers to a clearly identified candidate for Federal office;" (2) is made within 60 days of a general election or 30 days of primary election; and (3) in elections other than for president or vice-president, "is targeted to the relevant electorate." 2 U.S.C. § 434(f)(3)(A)(i). The fall-back definition, applicable if the primary definition "is held to be constitutionally insufficient by final judicial decision," defines "electioneering communication" as a "broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate." 2 U.S.C. § 434(f)(3)(A)(ii).

Appellants assert a facial challenge to both the primary and fall-back definitions of "electioneering communication." Appellants argue, first, that the primary definition, although precise and unambiguous, unconstitutionally imposes funding and disclosure restrictions on certain communications that may appear on the broadcast media in an electoral district during the period immediately preceding a federal election and use a candidate's name or likeness, but that are, nevertheless, unconnected with the forthcoming election. The possibility that the funding of such so-called "pure issue" communications might be restricted by BCRA, appellants argue, requires the invalidation of the primary definition on its face, even as applied to the vast majority of cases in which petitioners concede enforcement would not violate the First Amendment.

Turning to the fall-back definition, appellants contend that a definition of electioneering communication lim-

ited to speech that praises or criticizes a given candidate and that may not be plausibly understood as anything other than an exhortation to vote for or against the candidate, is unconstitutionally vague on its face. Appellants argue that since speakers cannot know with absolute certainty whether a given communication praising or criticizing a candidate for federal office can reasonably be construed as anything but a request for electoral support, speakers may self-censor and untrustworthy administrators will be vested with undue discretion to apply the statute in a viewpoint discriminatory manner.

Appellants' facial challenge to BCRA's two definitions of electioneering communications cannot stand. This Court has recognized that despite its important role as a protector of free expression, the First Amendment facial overbreadth doctrine exacts societal costs by striking down otherwise valid laws based on a judicial prediction that a law might be applied in an unconstitutional manner. Accordingly, the Court has limited facial overbreadth challenges to settings where plaintiffs can show that the feared unconstitutional applications of the law are "substantial" relative to those instances where it may be constitutionally applied. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *Virginia v. Hicks*, ___U.S.___, 123 S. Ct. 1291 (2003). Similarly, the Court has refused to impose the costs of facial overbreadth review in settings where affected speakers can effectively seek as-applied protection of First Amendment rights. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985). Since Congress's primary definition of electioneering communication is clearly constitutional in the vast bulk of its applications, and since appellants in this action, among the most powerful speakers in this country, may effectively seek as-applied relief from any allegedly unconstitutional application, the Court should reject

appellants' efforts to use facial review strategically in an effort to bring down the entire edifice of campaign finance regulation.

Appellants' facial vagueness challenge to Congress's fall-back definition of electioneering communication should likewise be rejected. Under settled law, a facial vagueness challenge may be raised only when a statute is so vague that it lacks an "operative core." *Smith v. Goguen*, 415 U.S. 566 (1974). It is impossible to argue persuasively that the back-up definition of electioneering communication lacks an "operative core." Indeed, in the vast majority of possible applications, the fall-back definition is perfectly clear. A reasonable person can understand whether a broadcast advertisement praises or criticizes a given candidate and whether the advertisement may plausibly be understood as anything other than an exhortation to vote for or against the candidate. Any purported vagueness in the fall-back definition at the margins may effectively be dealt with through an as-applied request for declaratory relief from the Federal Election Commission, or, if necessary, an Article III court. *Steffel v. Thompson*, 415 U.S. 452 (1974).

A. The Primary Definition of Electioneering Communications Is Facially Valid

This Court has traditionally required that persons seeking judicial review of the constitutionality of government action proceed on an "as-applied" basis, seeking relief against a credible and otherwise ripe threat to enforce a statute or regulation against the litigant's behavior. *See Yazoo & Mississippi Valley R.R. v. Jackson Vinegar*, 226 U.S. 217 (1912); *United States v. Raines*, 362 U.S. 17 (1960); *Warth v. Seldin*, 422 U.S. 490 (1975). Although an important exception to this principle has been recognized in the First Amendment context,

the Court has consistently required plaintiffs to demonstrate "substantial overbreadth" before resorting to the "strong medicine" of facial invalidation. *Broadrick*, 413 U.S. at 613; *see Houston v. Hill*, 482 U.S. 451, 458 (1987) ("Only a statute that is substantially overbroad may be invalidated on its face"). The Court has, therefore, rejected efforts to posit hypothetical future harms in limited circumstances as a basis for facial invalidation. *See, e.g., Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984) ("[T]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge"); *New York v. Ferber*, 458 U.S. 747, 771 (1982) ("[A] law should not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications..."); *United States v. Salerno*, 481 U.S. 739, 745 (1987).[4]

In the campaign finance context, this Court has effectively protected the First Amendment rights of participants in the electoral process through as-applied review and narrow construction. *See, e.g., FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (as-applied challenge holding that ban on corporate treasury expenditures on behalf of a federal candidate could not constitutionally be applied to a small, nonprofit advocacy group that received no financial support from capital corporations); *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*, 459 U.S. 87 (1982) (creating as-applied exception to Ohio campaign contribution disclosure rules for contributions to the Socialist Workers

[4] Notably, plaintiffs-appellants Mitch McConnell, *et al.*, in their discussion of the purported overbreadth of the primary definition of electioneering communication, do not cite to a *single one* of the Court's overbreadth cases. *See* McConnell Br. at 49-57.

Party based upon evidence that disclosure would subject party members to threats, harassment, and reprisals); *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996) (recognizing as-applied exception to efforts to limit the independent expenditures of a political party). Indeed, in *Buckley* itself, the Court recognized that the definition of "electioneering communication" in FECA was too broad. Instead of invalidating the entire scheme on its face, however, the *Buckley* Court posited a narrowing construction designed to avoid conflict with the First Amendment. *Buckley*, 424 U.S. at 42; *Cf. Broadrick v. Oklahoma*, 413 U.S. 601 (1973) (upholding Oklahoma's "Little Hatch Act," regulating political activities of government employees, in facial challenge because the protected speech at risk was not sufficiently "substantial" when compared with the sweep of unprotected activity lawfully regulated by the statute).

As the Court recently noted in *Virginia v. Hicks*, ____U.S. ____, 123 S.Ct. 1291, 1296-97 (2003), before applying the "strong medicine" of facial overbreadth invalidation, the Court has weighed the benefits of facial invalidation of a statute against the societal costs of blocking a statute in its numerous constitutional applications. "[T]here are substantial social costs *created* by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech." *Id.* at 1297 (emphasis in original). Thus, "[t]o ensure that these costs do not swallow the social benefits of declaring a law 'overbroad,'" the Court has "insisted that a law's application to protected speech be 'substantial,' not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications, before applying the 'strong medicine' of overbreadth invalidation." *Id.* (citing *Broadrick*, 413 U.S. at 613).

Due consideration of both the costs and benefits of resorting to the "strong medicine" of facial invalidation requires rejection of petitioners' facial challenge to BCRA's primary definition of electioneering communications. In the first place, resort to facial review is not necessary to protect a vulnerable speaker. Appellants in this action are among the nation's most powerful and wealthy speakers who are more than able to protect their First Amendment rights in as-applied challenges. *See Renne v. Geary*, 501 U.S. 312, 323-324 (1991) (facial challenge should generally not be entertained when an "as-applied" challenge could resolve the case); *Board of Trustees, State Univ. of New York v. Fox*, 492 U.S. 469, 484-85 (1989); *Brockett*, 472 U.S at 504.

The primary definition of electioneering communication is restricted to the funding of large-scale expenditures for broadcast advertisements using the name or likeness of a candidate in a period immediately preceding a federal election. Since vulnerable speakers who might be unable to raise as-applied challenges or to seek administrative guidance are highly unlikely to be affected by such a narrow law, BCRA simply does not raise concerns that would be present in settings involving vulnerable speakers who are unlikely to be in a position to preserve their First Amendment rights in more traditional as-applied proceedings. *See, e.g., Dombrowski v. Pfister*, 380 U.S. 479 (1965); *Coates v. City of Cincinnati*, 402 U.S. 611 (1971); *Gooding v. Wilson*, 405 U.S. 518 (1972).

Moreover, the risk to protected speech posed by the primary definition of electioneering communication is minimal. Contrary to appellants' hyperbole, Congress has not banned any speech in adopting the primary definition of electioneering communication. Rather, Congress has prohibited the use of corporate and labor

union treasury money to fund broadcast advertisements within 60 days of a general election and 30 days of a primary election in which the candidate's name or likeness is used and provided that other entities must disclose the source of the funds for these advertisements. In the overwhelming majority of settings, such a regulation aimed at reinforcing long-standing restrictions on the use of corporate and labor treasury funds in federal election campaigns and assuring disclosure of the sources of federal campaign funding raises no significant First Amendment issues. *Buckley*, 424 U.S. at 66-68 (upholding disclosure); *FEC v. Beaumont*, ___ U.S. ___, 123 S.Ct. 2200, 2211 (2003) (upholding ban on corporate treasury funds in federal elections).

Further, even in those relatively few instances in which the application of the primary definition may touch upon "pure issue advocacy," arguably beyond the scope of campaign finance regulation, appellants may simply establish a separate segregated fund with which to conduct such communications, funded in accordance with the same rules that apply to other electioneering communications. Such a minor administrative inconvenience hardly requires the strong medicine of facial overbreadth review. *See Regan v. Taxation With Representation*, 461 U.S. 540 (1983).

Finally, appellants wishing to avoid the administrative inconvenience of establishing a PAC can avoid the statute's reach entirely by simply omitting the candidate's name or likeness in the period immediately preceding a federal election.

In the district court, considerable attention was dedicated to calculating the percentage of "true issue advocacy" communications that would be captured by the primary definition of electioneering communications as a means of ascertaining whether the primary definition

was substantially overbroad. For this purpose, defendants submitted the *Buying Time* studies of advertisements airing in the 1998 and 2000 elections to which BCRA's primary definition would apply and argued that only a small percentage of these advertisements reflected "true issue advocacy," arguably beyond the purview of campaign finance legislation. Plaintiffs, for their part, submitted no independent evidence of the purported overbreadth of the primary definition, but rather relied upon their own analysis of defendants' studies which, they said, showed that approximately 50% of the advertisements airing in 1998 that would fall within BCRA's coverage and 17% of the advertisements in the 2000 election were "true issue advocacy." *See* Supp. App. at 244sa, 1349sa-1350sa; McConnell Br. at 56.

The three judges in the court below reached widely divergent conclusions as to the sweep of the primary definition. *See* Supp. App. at 1157sa (Judge Leon); *id.* at 857sa (Judge Kollar-Kotelly); *id.* at 244sa, 367sa n.149 (Judge Henderson). These widely differing analyses confirm the wisdom of an overbreadth analysis that looks to the costs and benefits of facial review, rather than a mechanical and unwieldy effort to estimate the percentage of communications that fall on one side or another of a constitutional line. *See* Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 Yale L.J. 853, 894 (1991) (rejecting empirical approach to overbreadth doctrine as requiring "uncabined judicial speculation in areas that are, at best, on the outer fringes of the courts' practical competence"). In fact, while the *Buying Time* studies contained the best available social science data and were of great assistance to Congress in seeking to predict the future, no study – especially a study that asks college students to discern the purpose of a political advertisement completely divorced from context - can provide a court with a precise percentage of hypothetical future speech that will raise significant First Amendment concerns. Only experience can provide that data and only as-applied review can respond appropriately to such data. Accordingly, appellants' effort to invalidate BCRA before any body of experience can develop should be rejected.

B. The Fall-back Definition of "Electioneering Communication" Is Facially Valid

Appellants' facial vagueness challenge to Congress's back up definition is equally unavailing. Appellants argue that the fall-back definition of "electioneering communication" limiting coverage to those communications that (1) praise or criticize a candidate for federal office and (2) cannot be plausibly construed as anything other than an exhortation to vote for or against the candidate, introduces an element of subjective uncertainty into the statutory scheme and therefore must be stricken on its face.

The Court will strike a statute for facial vagueness only in extremely narrow circumstances where the statute lacks an "operative core" of prohibited behavior. *See Smith v. Goguen*, 415 U.S. 566 (1974); *Secretary of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 965-966 (1984) *City of Chicago v. Morales*, 527 U.S. 41, 56-57 (1999). In such a situation, the statute is vague "'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.'" *Smith*, 415 U.S. at 578 (quoting *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971)); *see Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (California statute requiring persons who loiter or wander on the streets to provide "credible and reliable" identification "contains no standard for determining what a suspect

has to do in order to satisfy the requirement to provide a 'credible and reliable' identification"); *Smith*, 415 U.S. at 578 (Massachusetts statute prohibiting "publicly treat[ing] contemptuously the flag of the United States" specifies "no standard of conduct" and therefore facially vague); *City of Chicago*, 527 U.S. at 59-60 (striking on facial vagueness grounds Chicago anti-loitering ordinance prohibiting individuals from "remain[ing] in any one place with no apparent purpose"); *Cf. Spence v. Washington*, 418 U.S. 405, 414 n.9 (1974).

The fall-back definition of electioneering communications is not facially vague under such a test. In the vast majority of cases, application of the fall-back definition raises no difficult issues of statutory construction and neither prospective speakers nor regulators can have any doubt as to the statute's applicability. The statute thus has a "core of easily identifiable and constitutionally proscribable conduct," *Munson*, 467 U.S. at 965-966. If, as appellants allege, certain circumstances may arise in which the scope of the prohibition is unclear, an appropriate as applied challenge may be brought before both the FEC and an Article III Court to determine the applicability of the statute.

II. EXPRESS ADVOCACY IS NOT A CONSTITUTIONAL CEILING

Appellants contend that BCRA's primary and fall-back definitions of "electioneering communication" violate a putative constitutional requirement that campaign finance restrictions be limited to speech that expressly advocates the election or defeat of a candidate by using magic words such as "vote for" or "vote against" the candidate.[5] The magic words version of an express advocacy limitation is not an irreducible constitutional ceiling, restricting any conceivable regulation of independent expenditures. Rather, the Court resorted to a magic words approach to express advocacy as a narrowing construction to avoid constitutional issues raised by certain provisions of FECA, namely that the provisions did not clearly demarcate what conduct was prohibited and might have regulated speech too far afield from the election campaign of a specific candidate for federal office. Neither of these vulnerabilities is present in the electioneering communication provisions of BCRA.

The Court in *Buckley* twice construed a provision of FECA to apply only to expenditures used to fund communications that use magic words to expressly advocate the election or defeat of a candidate. Each time, the Court used magic word/express advocacy as a saving construction of statutory language that would otherwise be unconstitutionally vague or reach communications not clearly related to the campaign of a particular federal candidate. Neither in *Buckley* nor thereafter has the Court suggested that a campaign finance regulation without these infirmities must be limited to a magic word version of express advocacy.

The *Buckley* Court first discussed express advocacy in the context of FECA's $1,000 ceiling on expenditures "relative to a clearly identified candidate." "The use of

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[5] The contention that the Court's limiting construction in *Buckley* creates a constitutional ceiling beyond which no permissible regulation of electioneering communications may regulate is the sole issue properly before the Court in facial challenge to the electioneering provisions of BCRA. If, as appellants contend, *Buckley*'s magic words of express advocacy forever constrain Congress from fixing a definition of electioneering communications beyond these magic words, then BCRA's regulation of electioneering communications beyond express advocacy would be unconstitutional in all its applications and therefore be subject to facial challenge. However, as shown below, nothing in the Court's precedents sustains appellants' contention.

so indefinite a phrase as 'relative to' a candidate," the Court explained, "fails to clearly mark the boundary between permissible and impermissible speech . . . ." *Buckley*, 424 U.S. at 41. In the Court's view, the vagueness problem was not overcome by the court of appeals' reading of the statutory term "relative to a . . . candidate" to mean "advocating a candidate's election or defeat." The problem with that interpretation, the Court explained, is that a speaker could never be certain whether any particular political communication would be deemed electoral advocacy—and thus within the statute's reach—or mere "issue advocacy." "For the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions." *Id.* at 42. The Court therefore adopted a more precise interpretation of the statutory language than the one put forward by the Court of Appeals: "[I]n order to preserve the provision against invalidation on vagueness grounds, [the expenditure ceiling] must be construed to apply only to expenditures for communications that in *express terms* advocate the election or defeat of a clearly identified candidate for federal office." *Id.* at 43 (emphasis added).

In contrast, BCRA leaves no doubt whether any particular expenditure will be deemed to have been made for an "electioneering communication." Four criteria must be satisfied to come within the statute's reach: There must be (1) a broadcast, cable or satellite communication; (2) which refers to a clearly identified candidate for federal office; (3) is made within 60 days before the election for the office sought by the candidate (or 30 days before the primary or caucus); and (4) is targeted to the relevant electorate, unless the office

sought is President or Vice-President. 2 U.S.C. § 434(f)(3)(A)(i).

Whether an expenditure satisfies each of these criteria may easily be determined, and a speaker need only negative any one of them to avoid application of the statute. Consequently, no one could plausibly claim to have been deprived of "'fair warning'" as to what conduct the statute regulates. *Buckley*, 424 U.S. at 41 n.48 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972)). Nor is any speaker compelled to "'hedge and trim,'" or refrain even from unregulated speech because the boundaries of the statute's coverage are not clearly marked. *Buckley*, 424 U.S. at 43 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)). In short, BCRA regulates with "narrow specificity," just as the First Amendment requires. *NAACP v. Button*, 371 U.S. 415, 433 (1963).

The *Buckley* Court returned to express advocacy when construing FECA's disclosure requirements for expenditures made by persons other than candidates and groups other than political committees. "To insure that the reach of [the disclosure provision] is not impermissibly broad, we construe 'expenditure' for purposes of that section . . . to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate. This reading is directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate." *Id.* at 80 (internal footnote omitted).

Unlike FECA, in the vast majority of applications, BCRA is directed at "spending that is unambiguously related to the campaign of a particular federal candidate." As noted, the primary definition requires that a subject communication must refer to a clearly identified candidate, must be made within a short period preceding

an election or vote for nomination, and must be targeted to the relevant electorate. Taken together, these requirements ensure that the overwhelming majority of communications subject to BCRA are communications intended to be and received as messages in support or opposition to a candidate.

Notably, two of these three requirements in the primary definition of electioneering communications were lacking in FECA's provisions regulating expenditures. Although FECA limited its reach to expenditures that were "relative to a clearly identified candidate," or "for the purpose of influencing" an election, it did not restrict its coverage to a narrow time frame preceding an election or vote for nomination. Nor did FECA limit its scope to communications that, where appropriate, are targeted to the relevant electorate. These additional statutory criteria sharpen the focus of the BCRA's electioneering communication provisions as compared with FECA's regulation of expenditures. Virtually any information about a candidate worth sharing and distributed to the relevant electorate soon before an election will be received by listeners as potentially pertinent to voting decisions. BCRA thus restricts its reach to communications that will inevitably be understood as supporting or opposing a candidate's election. Consequently, under the plain language of BCRA—but not under the plain language of FECA—only communications unambiguously related to a particular candidate's campaign will be covered by the statute.[6] Applying the Court's analysis in *Buckley*, then, no magic words/express advocacy limi-

[6] As noted in Point I, above, to the degree to which BCRA applies to broadcast advertisements referring to clearly identified federal candidates and appearing shortly before an election, but which nevertheless are unrelated to the upcoming election, an appropriate as-applied challenge may be raised.

tation nor any other narrowing construction is needed to make the BCRA's "electioneering communication" provision consistent with the First Amendment.

Appellants' argument that the First Amendment requires all regulations of campaign finance expenditures to be limited to a magic words approach to express advocacy rests on a misreading of *Buckley*. Appellants contend that the use of magic words as a form of express advocacy demarcates the boundary between "electoral advocacy," which may permissibly be regulated, and "issue advocacy," which, on appellants' theory, may not be. As the *Buckley* Court plainly recognized, however, the very distinction between electoral advocacy and issue advocacy is frequently a false dichotomy. *See id.* at 42 ("[T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application").

Moreover, as the Court observed when invalidating FECA's expenditure ceiling: "[I]t would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate's campaign." *Buckley*, 424 U.S. at 45.

In this light, the net result of the magic words/express advocacy limitation urged by appellants is not the drawing of a line between regulable and non-regulable speech. Rather, appellants ask the Court to hold that the Constitution prohibits effective regulation of expenditures for any form of advocacy, whether for issues or elections. For any campaign finance regulation limited by a magic words approach to express advocacy will, in practice, function as a purely voluntary regime. As the record below amply demonstrates, it is a simple matter

to express support or opposition for a candidate's election without invoking talismanic phrases such as "vote for" or "vote against" which, on petitioners' view, are the only suitable means of identifying communications subject to regulation.

Consequently, the elevation of a magic words approach express advocacy from a narrowing construction of a poorly drafted statute into an irreducible constitutional ceiling, as petitioners propose, would forever prevent Congress from advancing the substantial interests served by disclosure requirements for independent expenditures—interests which, according to this Court, themselves "furthe[r] First Amendment values by opening the basic processes of our federal election system to public view." *Buckley*, 424 U.S. at 82.

Likewise, the transformation of a magic words approach to express advocacy into a constitutional ceiling would forever free corporations to use corporate treasury funds for independent expenditures to support or oppose candidates for Federal office—notwithstanding the Court's holding that "the compelling governmental interest in preventing corruption support[s] the restriction of the influence of political war chests funneled through the corporate form." *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 659 (1990) (quoting *FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 500-01 (1985)). If appellants' theory of express advocacy is correct, the Constitution leaves Congress no practicable means of remedying "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Austin*, 494 U.S. at 660; *see Beaumont*, 123 S.Ct. at

2206-07. Nothing in *Buckley* or the Court's campaign finance jurisprudence dictates that result.

III. DISCLOSURE REQUIREMENTS AND PROHIBITIONS ON CORPORATE AND LABOR UNION FUNDING OF ELECTIONEERING COMMUNICATIONS SERVE IMPORTANT FIRST AMENDMENT INTERESTS

As argued in Point I, above, this Court should not entertain appellants' facial overbreadth and vagueness challenges to either the primary or fall-back definitions of "electioneering communication." Assuming the Court chooses to address the merits of these arguments, the Court should uphold the electioneering provisions of BCRA.

The Court has long held that fundamental First Amendment principles support reasonable disclosure and funding requirements for electoral communications. First, the Court has repeatedly held that disclosure requirements enhance, rather than retard, First Amendment interests. As the Court has recognized, the marketplace of ideas that the First Amendment guarantees is ill-served by a regime of shadowy, untraceable expenditures for electioneering communications by groups that disguise their true sources of support. Second, the Court has repeatedly recognized that the marketplace of ideas suffers when corporations and labor unions are able to monopolize electoral communications through the state-conferred advantages that permit them to amass large quantities of capital unrelated to the support for their political positions.

The electioneering provisions of BCRA, Sections 201-204, build directly upon these long-standing pillars of the Court's campaign finance jurisprudence. First, in line with long-upheld restrictions on corporate and labor

union electioneering activities, BCRA prohibits corporate and labor union funding of broadcast communications which clearly identify a candidate within 60 days of a general election or 30 days of a primary election and are targeted to the candidate's electorate. Second, BCRA requires entities or individuals who spend more than $10,000 in a calendar year on such broadcast communications to disclose the sources of funding for these communications. These provisions are fully consistent with the First Amendment principles long recognized by this Court.

A. BCRA's Disclosure Requirements Are Constitutional

Section 201 of BCRA requires every person who makes disbursements in excess of $10,000 per year for electioneering communications to file with the FEC a statement containing the person's identity and principal place of business; the amount of each disbursement over $200 and the identity of the recipient of the disbursement; the elections and candidates to which the electioneering communications pertain; and the names and addresses of contributors who contributed $10,000 or more to the person or separate segregated fund making the disbursement. 2 U.S.C. § 434 (f)(1), (2).

The Court has previously recognized that the governmental interests advanced by disclosure requirements are especially likely to outweigh any potential inhibition of First Amendment activity where, as here, "the 'free functioning of our national institutions' is involved." *Buckley*, 424 U.S. at 66 (quoting *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 97 (1961)). The Court has further noted that "disclosure requirements . . . in most applications appear to be the least restrictive means of curbing the evils of campaign

ignorance and corruption that Congress found to exist." *Buckley*, 424 U.S. at 68. "'Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.'" *Id.* at 67 (quoting L. Brandeis, *Other People's Money* at 62 (National Home Library Foundation ed. 1933)).

Applying these principles in *Buckley*, the Court upheld disclosure requirements substantially similar to those at issue here. As in *Buckley*, the disclosures mandated by BCRA advance at least three governmental interests. First, BCRA's disclosure provisions assist voters by publicizing a candidate's sources of financial support, thereby identifying the interests to which the candidate is likely to be responsive if elected. *See Buckley*, 424 U.S. at 66-67. "Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity." *Id.* at 67. "Third, and not least significant," disclosure facilitates enforcement of contribution limitations. *Id.* at 67-68.

BCRA's disclosure requirements raise none of the vagueness concerns that prompted the *Buckley* Court to adopt a narrowing construction of FECA's disclosure provision for expenditures by parties other than candidates or political committees. FECA defined "expenditure" to mean the use of money or valuable assets "for the purpose of . . . influencing" a federal nomination or election. *Id.* at 77; FECA §§ 431(e), (f). "It [wa]s the ambiguity of this phrase that pose[d] constitutional problems." *Buckley*, 424 U.S. at 77. To avoid those problems, the Court interpreted "for the purpose of . . . influencing" an election to mean using magic words for the purpose of expressly advocating a candidate's election or defeat, for purposes of section 434(e)'s disclosure

requirements for persons other than candidates or political committees. *Id.* at 80.

As discussed above, section 201's definition of "electioneering communication" is not similarly ambiguous in its reach. The statute leaves virtually no doubt whether particular conduct will trigger disclosure obligations. The precision of the legislation not only provides adequate notice to persons contemplating future expenditures, it also defines a safe harbor for pure issue advocacy. Those wishing to engage in issue advocacy free from regulation may do so easily by avoiding any one of the statutory criteria.

Section 201 likewise does not require disclosure of information too remote from the government's objectives to sustain the legislation. *Cf. Buckley*, 424 U.S. at 80-81. Virtually any "electioneering communication" within the meaning of section 201 will relate to the campaign of a specific candidate and will therefore properly be the target of the government's anti-corruption and informational interests advanced by disclosure.

The weighty First Amendment values served by disclosure would forever be compromised if the Court were to treat the magic words approach to express advocacy as a constitutional ceiling on the regulation of independent expenditures. As with section 434(e) of FECA, section 201 "is responsive to the legitimate fear that efforts would be made, as they had been in the past, to avoid the disclosure requirements by routing financial support of candidates through avenues not explicitly covered by the general provisions of the Act." *Id.* at 76 (internal footnote omitted). As the Court predicted when discussing express advocacy in the context of FECA's expenditure caps, *see id.* at 45, the express advocacy limitation made it a simple matter to circumvent pre-BCRA regulation of expenditures while engaging in full-blown electoral

advocacy. Section 201 is well-drawn because it provides ample breathing room for discussion of issues while targeting communications overwhelmingly likely to be understood as supporting or opposing a particular candidate's election.

To the extent BCRA's disclosure requirements may unduly burden any particular group, adequate protection is available through as-applied challenges. The *Buckley* Court spelled out clearly the evidentiary requirement necessary to prevail in such a challenge, and called for "flexibility in the proof of injury" from disclosure. *See Buckley*, 424 U.S. at 74. Applying those standards, the Court subsequently found Ohio's disclosure requirement unconstitutional as applied to the Socialist Workers Party of Ohio. *See Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 102 (1982). As the Court observed in *Buckley*, it "cannot assume that courts will be insensitive to similar showings when made in future cases." *Buckley*, 424 U.S. at 74.

B. BCRA's Restriction of Corporation and Labor Union Funding of Electioneering Communications Is Constitutional

Federal law has long prohibited the use of corporate and labor treasury funds for federal election activities and required that any corporate or labor expenditures on these activities be made from separate, segregated funds. Congress first prohibited corporate contributions to candidates for election to federal offices in the Tillman Act of 1907, 34 Stat. 864 (1907). Congress extended the prohibition on corporate contributions to labor unions and prohibited corporate and union expenditures in connection with federal elections in the Taft-Hartley Act, 61 Stat. 136 (1947); *Beaumont*, 123 S.Ct. at 2205-06; *FEC v. National Right to Work Committee*, 459 U.S. 197, 208

(1982); *Pipefitters Local Union No. 562 v. U.S.*, 407 U.S. 385, 402 (1972); *United States v. United Auto Workers* ("*UAW*"), 352 U.S. 567, 585 (1957). These long-standing prohibitions were incorporated into FECA, adopted following Watergate, and have long been upheld.

In *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), the Court examined provisions of Michigan's campaign finance law, which, like FECA, prohibited corporate contributions or expenditures in connection with an election. The Court reasoned that, given the special advantages conferred on corporations under state law, they can accumulate large quantities of capital which "have little or no correlation to the public's support for the corporation's political ideas." *Id.* at 660. *Austin* upheld the prohibition on corporate contributions and expenditures to guard against "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form" and to "ensure[] that expenditures reflect actual public support for the political ideas espoused by corporations." *Id.*; *see FEC v. National Right to Work Committee*, 459 U.S. 197, 207 (1982) ("[S]ubstantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political 'war chests' which could be used to incur political debts from legislators").

The reasoning of *Austin* was reaffirmed in the Court's recent decision in *FEC v. Beaumont*, ___ U.S. ___,123 S.Ct. 2200 (2003). In upholding the prohibition on corporate contributions as applied to nonprofit advocacy groups, the Court noted that "as in 1907, the law focuses on the 'special characteristics of the corporate structure' that threaten the integrity of the political process." *Beaumont*, 123 S.Ct. at 2207 (quoting *National Right to Work*,

459 U.S. at 209). The Court reaffirmed "the public interest in 'restrict[ing] the influence of political war chests funneled through the corporate form.'" *Id.* (quoting *National Conservative Political Action Comm.*, 470 U.S. at 496-497); *see UAW*, 352 U.S. at 585 (examining extensive history of prohibition of labor union contributions and expenditures in federal elections).

Building upon the long-standing prohibition on corporate and labor union expenditures for electioneering activities, BCRA expands the definition of electioneering activities to include broadcast advertisements made within 60 days of a general election or 30 days of a primary election, referring specifically to an identified candidate for federal office within the jurisdiction in which the candidate seeks office. Congress reasonably could conclude that these communications present the same distortive effects as those expressly advocating the election or defeat of a candidate. Moreover, such communications may still be funded through a corporation or labor union's separately segregated fund.

C. The Exception for MCFL Corporations Is Preserved by BCRA

In *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*"), the Court held unconstitutional the application of FECA's independent expenditure limitations to nonprofit advocacy corporations which receive no corporate or labor union funding. As set forth in the Court's opinion, three "essential" characteristics of Massachusetts Citizens for Life made it constitutionally impermissible to apply FECA to it. First, MCFL was "formed for the express purpose of promoting political ideas, and cannot engage in business activities." *MCFL*, 479 U.S. at 264. Second, it had "no shareholders or other persons affili-

ated so as to have a claim on its assets or earnings." *Id.* Third, MCFL "was not established by a business corporation or a labor union" and had a "policy not to accept contributions from such entities." *Id.* This policy of refusing business corporation or labor union contributions "prevent[ed] such corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace." *Id; see also Austin*, *supra*, at 664 (noting that a nonprofit corporation is capable of "serv[ing] as a conduit for corporate political spending").

Amici acknowledge that Section 204, known as the Wellstone Amendment, would appear to make BCRA applicable to *MCFL*-type corporations. As a constitutional rule, however, *MCFL* cannot be repealed by legislative enactment. *See City of Boerne v. Flores*, 521 U.S. 507, 519 (1997). The FEC's implementing regulations confirm this understanding of BCRA. *See* Electioneering Com-munications, 67 Fed. Reg. 65190, 65203-04 (October 24, 2002), <available at http://www.fec.gov/pdf/nprm/electioneering_comm/fr67n205p65189.pdf>. Thus, under BCRA, corporations that meet the three requirements set forth in *MCFL* continue to be exempt from the disclosure requirements and expenditure limitations of FECA.

Nonprofit advocacy corporations that continue to receive corporate and/or labor union contributions are therefore faced with a choice under BCRA. They can either refuse to accept such contributions, thereby exempting themselves from BCRA's disclosure rules and expenditure limitations, or accept such contributions, subjecting themselves to BCRA with its requirement that electioneering communications be funded through a segregated fund. Given the compelling interest in preventing nonprofit corporations from being used as conduits for prohibited corporate and labor union electioneering

activities, the application of BCRA to nonprofit corporations that choose to receive corporate and labor union contributions is clearly constitutional, especially since the option of establishing a PAC leaves open a full range of communicative options.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully submit that the electioneering provisions of BCRA, Sections 201-204, are constitutional.

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